

BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION  
STATE OF FLORIDA

INQUIRY CONCERNING JUDGE  
HOWARD C. BERMAN, JQC NO.  
00-211

CASE NO. SC00-2491

**MOTION IN LIMINE AND MEMORANDUM IN SUPPORT**

HOWARD C. BERMAN ("Judge Berman"), by and through undersigned counsel, moves the Judicial Qualifications Commission ("JQC") for an Order in Limine to preclude questioning, introduction of evidence, or commentary from or pertaining to the testimony of the witnesses, Laura Johnson and Laurie Graves Gordon, on the following grounds:

**I. Motion in Limine with Regard to Laura Johnson:**

A. In the Prehearing Statement of the JQC in Case No. 00-211, the attorney for the JQC indicates that Laura Johnson will testify pursuant to Rule 90.404 as to "similar acts" on the part of Judge Berman. Specifically, it is contended that when Laura Johnson and Judge Berman worked together at the State Attorneys' Office, he made unwanted sexual overtures toward her. (Laura Johnson was not listed until August 10, 2001 as a potential witness.)

B. Laura Johnson's deposition testimony indicates that when she and Judge Berman were both Assistant State Attorneys seventeen (17) or so years ago, Howard Berman attempted to kiss her on one occasion and on another occasion, while she was in his home with just two of them present, Howard Berman appeared almost unclothed, when there was no basis or reason for such conduct. She also testified that he subsequently made telephone calls to her of a suggestive nature, which were not welcomed by her.

C. Judge Berman has been on the bench for fifteen years. He has not worked in the State Attorneys' Office since 1986. The earliest allegations in the Notice of Formal Charges against Judge Berman occurred in 1996, twelve years after any alleged incident with Laura Johnson while they were both attorneys in the State Attorneys' Office.

D. Although Judge Berman categorically denies the events indicated by Laura Johnson and, in fact, will testify that he and Laura Johnson had a consensual relationship, the JQC should not be placed in a position where they are required to determine the credibility of this testimony because the testimony is not admissible under F.S. 90.404 as a "similar act."

E. Based upon the law as set forth below, the testimony of Laura Johnson should be excluded.

## **II. Motion in Limine with Regard to Laura Graves Gordon:**

A. In the Prehearing Statement of the JQC in Case No. 00-211, the attorney for the JQC states that Laura Graves Gordon will testify pursuant to Rule 90.404 as to "similar acts" on the part of Judge Berman. (Laura Graves Gordon was not listed by the attorney for the JQC until August 10, 2001, as a potential witness.) Ms. Graves, it is represented, will allege that she and Judge Berman appeared on a panel to discuss foster parenting and that, afterward, he inappropriately touched her and that his conduct was unwelcome, and not consensual.

B. The deposition testimony of Laura Graves Gordon reflects that she and Judge Berman testified on a panel to discuss foster parenting in 1995, at which time she was employed by HRS. She says that following a panel discussion, while standing in a group of four or five people including herself and Judge Berman, Judge Berman placed his hand between her legs, first from the front and then from behind. She walked away and said nothing to Judge Berman or anyone else. She later told her husband-to-be of the incident.

C. Although Judge Berman categorically denies the allegations of Ms. Gordon, the JQC should not be required to make a determination with regard to credibility because the testimony of Ms. Gordon is clearly inadmissible under the case law decided applying F.S. 90.404.

#### **MEMORANDUM OF LAW**

The Notice of Formal Charges against Judge Berman does not mention either Laura Johnson, or any event related to Laura Johnson, or Laura Graves Gordon, or any event related to Laura Graves Gordon. Neither Laura Johnson nor Laura Graves Gordon were listed by the attorney for the JQC as witnesses until the Witness Statement filed August 10, 2001, approximately one month before the scheduled formal hearing on the charges against Judge Berman. Having omitted to include anything in the formal charges with regard to either Laura Johnson or Laura Graves Gordon, the attorney for the JQC now

attempts to present evidence of wrongdoing by Judge Berman, with regard to these two witnesses, arguing that their testimony is admissible under F.S. 90.404 which provides:

“90.404. Character evidence; when admissible.

\* \* \* (2) Other crimes, wrongs, or acts. –

(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.”

Collateral “crime” evidence is not admissible where the collateral “crime” is merely similar to the crime for which the defendant is on trial. See Bricker v. State, 462 So. 2d 556 (3 DCA Fla. 1985); Crammer v. State, 391 So. 2d 803 (Fla. 2d DCA 1980). The Court in Bricker relied on Green v. State, 427 So. 2d 1036 (Fla. 3d DCA), pet. for rev. denied, 438 So. 2d 834 (Fla. 1983), which stated:

“The similar crimes test is a stringent one: there must be something so unique or particularly unusual about the perpetrator or his *modus operandi* that it would tend to establish, independently of an identification of him by the collateral crime victim, that he committed the crime charged.”

The Court in Bricker, as in Green, held that there were no features of the prior incident which were so unique as to be, compared with the present offense, a “fingerprint type” characteristic. Likewise, in State v. Savino, 567 So. 2d 892 (Fla. 1990), the Florida Supreme Court stated:

“When the purported relevancy of past crimes is to identify the perpetrator of the crime being tried, we have required a close similarity of facts, a unique or ‘fingerprint’ type of information, for the evidence to be relevant.”

In Savino, the trial judge found that the wife’s alleged abuse of a one month old child in a different state, in a different marriage, and in a different manner was not sufficiently similar to be admissible in Savino’s trial for the death of her six year old child. The Supreme Court found no abuse of discretion in this ruling. Although this JQC matter does not involve a “crime,” there is no distinction under the evidence code between civil and criminal proceedings in this section of the code.

The rule is sometimes stated that the collateral offense, i.e., the purportedly similar act, must share unique characteristics with the charged offense. See Thomas v. State, 660 So. 2d 762 (2 DCA Fla. 1995), Feller v. State, 637 So. 2d 911, 916 (Fla. 1994). There are no “unique characteristics” of the Johnson or Graves/Gordon testimony in comparison to the offenses alleged in the JQC Formal Charges.

The statute specifically prohibits the introduction of similar act testimony if the purpose is “relevant solely to prove bad character or propensity.” Judge Berman respectfully submits that this is the only purpose for such testimony in the instant case.

Additionally, there must be a sufficient time nexus between the collateral occurrences and the conduct in question. If the prior activity is too remote, the necessary probative force will not be present and the evidence will be excluded. Ehrhardt, Florida Evidence, 2001 Edition, p. 190, Section 404.9. See also McGough v. State, 302 So. 2d

751 (Fla. 1974); Robertson v. State, 25 FLW D. 900, 2000 WL 368468 (Fla. 3d DCA 2000). The Johnson incident occurred in 1984, twelve (12) years before any relevant event.

WHEREFORE, Judge Berman seeks an order excluding the testimony of Ms. Johnson and Ms. Gordon.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and U.S. Mail to the persons on the attached Service List this 6th day of September, 2001.

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